

No. 16063.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EMERALD PORTLAND CEMENT COMPANY,

Appellant.

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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No. 16063.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONOLITH PORTLAND CEMENT COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

JURISDICTION OF THE COURT.

This action for refund of income taxes was commenced in the District Court for the Southern District of California, Central Division, under Section 1346 of Title 28 of the United States Code. The jurisdiction of this Court rests upon Section 1291 of the Judicial Code.

II.

STATEMENT OF THE CASE.

A. Statement of the Question Involved.

Whether "chemical grade limestone" which was accorded a percentage depletion at the rate of 15% by Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended, is commonly commercially understood to mean and was intended by Congress to encompass limestone whose chemical composition and physical

characteristics are such as to make it suitable for use in the industrial chemical process of producing cement.

The District Court in effect answered this question "No" by holding that taxpayer's limestone was not "chemical grade" as contemplated by the statute, although such limestone was admittedly of such quality, chemical composition and physical characteristics as to make it suitable for use in the industrial chemical process of producing cement. Taxpayer contends this question should be answered "Yes."

In addition, by its cross-appeal, appellee seeks to: (1) raise an issue as to whether appellant's bagging operation should be excluded from the ordinary treatment processes for percentage depletion purposes as held by the District Court following the parties' stipulations; and (2) asserts that the District Court erred in holding that the income and expenses attributable to the mineral materials which appellant adds to its limestone in order to obtain finished cement should be included when computing appellant's allowable percentage depletion deduction.

B. Nature of the Case.

Appellant, Monolith Portland Cement Company, herein sometimes called "taxpayer," and "Monolith," on July 27, 1956, filed a civil action against the United States under the provisions of Section 1346, Title 28 of the United States Code, as amended on July 30, 1954, for the recovery of internal revenue taxes alleged to have been erroneously and illegally assessed against and collected from the taxpayer by the Commissioner of Internal Revenue.

Taxpayer is the owner and operator of a cement plant at Monolith, California, where it operates a limestone rock quarry and uses the limestone rock so extracted in the manufacture of Portland cement. This suit involves the rate of percentage depletion to which the taxpayer is entitled on its gross income from mining, in the calendar

year 1951, under the Internal Revenue Code of 1939, as amended October 20, 1951, in force and effect in that year (26 U. S. C. 23(m) and 114(b)(4)(A)).

In order to obtain great and repeated delays, defendant's counsel made stipulations and representations to the court withdrawing from controversy questions concerning bags and bagging and other issues as shown by the record and three stipulations of fact. [Exs. 24, 25, 27.] Thereafter, defendant's counsel requested the findings and a proposed judgment carrying out the stipulations, and the issues were so tried and submitted. Defendant's counsel did, after the final submission of the case, make a belated effort to discredit some of the stipulations and representations, but the court considered this effort as not being timely and under the record made by the parties, as containing no merit.

C. The Judgment in the District Court.

The case was tried without a jury before the Honorable William C. Mathes, District Judge. On August 2, 1957, the Court received in evidence Exhibits 1 to 23 offered by taxpayer; on March 21, 1958, the Court heard the evidence of witnesses called by taxpayer, and received in evidence Exhibits 24, 25 and 27 to 32 offered by taxpayer; and, on March 24, 1958, the court received in evidence Exhibit 33 offered by taxpayer. The testimony of Dr. Oliver Bowles, witness for the United States, was received in deposition form, Exhibit 23.

After oral argument and ruling from the bench, the Court on April 14, 1958, entered judgment in favor of taxpayer in the sum of \$264,435.41 with interest as provided by law. [R. 72-73.] The trial judge did not write an opinion.

D. The Trial Court's Findings of Fact and Conclusions of Law and Judgment.

The findings of fact, conclusions of law and judgment herein filed and entered April 14, 1958, are reproduced in full in the record. [R. 62-73.] However, the relevant and pertinent findings of fact and conclusions of law, with regard to the basic question presented by this appeal, are set forth herein for easy reference.

“FINDING OF FACT III.

“During the entire year 1951 plaintiff mined a calcium carbonate rock generally known as ‘limestone,’ which it processed by the usual and customary process steps applied in the cement industry to obtain any of the various types of Portland cement. Said processes were applied by plaintiff at its cement plant at Monolith, California, adjacent to the quarry from which plaintiff mines the limestone. The process of heating or calcining of the materials used by plaintiff caused chemical changes to occur in them to obtain cement.

“FINDING OF FACT V.

“The actual computed average high and low chemical analysis, made approximately each week, of the material mined by plaintiff during the year 1951 revealed a high of 87.68% calcium carbonate and a low of 82.45% calcium carbonate, or an average of 85.20% of calcium carbonate. The calcium carbonate content of plaintiff’s limestone involved in this case was not high enough to qualify the material as ‘chemical grade limestone’ within the meaning of Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended.

“FINDING OF FACT VI.

“The only product sold by plaintiff during the year 1951 as a result of its limestone mining operations

was Portland cement in bulk and in bag or sack containers.

“FINDING OF FACT XVI.

“The record shows, and the Court finds as a fact, that limestone of a relatively high calcium carbonate content is known in industry and commerce as chemical or metallurgical grade limestone.

“CONCLUSION OF LAW II.

“Plaintiff, as mine operator, mined a calcium carbonate rock generally known as ‘limestone’ which it processed to obtain any of the various types of Portland cement.

“CONCLUSION OF LAW III.

“‘Chemical grade limestone’ within the meaning of the term as used in Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended, means a limestone which is of a relatively high calcium carbonate content.

“CONCLUSION OF LAW IV.

“The calcium carbonate rock mined by plaintiff was not a ‘chemical grade limestone’ within the meaning of the statute, and so was subject to a percentage depletion allowance of ten (10) per centum within the provisions of Section 114(b)(4)(A)(ii) of the Internal Revenue Code of 1939, as amended.

“CONCLUSION OF LAW XI.

“All findings of fact which are deemed to be conclusions of law are hereby incorporated in these conclusions of law.”

III.
THE STATUTE INVOLVED.

The pertinent statute, Internal Revenue Code of 1939, as amended (26 U. S. C. 23(m) and 114(b)(4)), provides that:

“Sec. 23. DEDUCTIONS FROM GROSS INCOME.

“In computing net income there shall be allowed as deductions:

* * * * *

“(m) Depletion.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * *”

“(n) * * * The basis upon which depletion, * * * are to be allowed * * * shall be as provided in section 114.”

* * * * *

“Sec. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

“(b) Basis for Depletion.

* * * * *

“(4) Percentage Depletion for Coal and Metal Mines and for Certain Other Mines and Natural Mineral Deposits.

“(A) In General.—The allowance for depletion under section 23(m) in the case of the following mines and other natural deposits shall be—

“(i) in the case of sand, gravel, slate, stone (including pumice and scoria), brick and tile clay, shale, oyster shell, clam shell, granite, marble, sodium chlo-

ride, and, if from brine wells, calcium chloride, magnesium chloride, and bromine, 5 per centum,

“(ii) in the case of coal, asbestos, brucite, dolomite, magnesite, perlite, wollastonite, *calcium carbonates*, and magnesium carbonate, *10 per centum*,

“(iii) in the case of metal mines, aplite, bauxite, fluorspar, flake graphite, vermiculite, beryl, garnet, feldspar, mica, talc (including pyrophyllite), lepidolite, spodumene, barite, ball clay, sagger clay, china clay, phosphate rock, rock asphalt, trona bentonite, gilsonite, thenardite, borax, fuller’s earth, tripoli, refractory and fire clay, quartzite, diatomaceous earth, metallurgical grade limestone, *chemical grade limestone*, and potash, *15 per centum*, and

“(iv) in the case of sulfur, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. *Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under section 23(m) be less than it would be if computed without reference to this paragraph. (Italics added.)*

“(B) Definition of gross income from property.—As used in this paragraph the term ‘gross income from the property’ means the gross income from mining. The term ‘mining’ as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point

of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills
* * *

IV.

STATEMENT OF ISSUES INVOLVED.

The basic question before the Court on this appeal is simply whether taxpayer is entitled to have its limestone classified as “chemical grade.” The determination of this question hinges upon whether taxpayer’s limestone quarried and used in its cement operation in 1951 was “chemical grade limestone” or merely “calcium carbonates” within the meaning of Section 114(b)(4)(A) of the Internal Revenue Code of 1939, as amended.

By its Statement of Points on its cross-appeal [R. 148] filed herein, some two months after its Notice of Appeal [R. 75] the respondent apparently seeks to repudiate its stipulations below whereby it agreed that the appellant’s bagging operation should be excluded from the ordinary treatment processes for percentage depletion purposes. This problem will be separately discussed following the basic question of “chemical grade limestone,” as will respondent’s second point challenging the correctness of the trial court’s ruling on additives.

Monolith was “aggrieved” by the judgment below and entitled to review thereof, because:

1. Monolith’s limestone all comes from one deposit. Such judgment, describing and classifying limestone used in 1951 as not “chemical grade” adversely affected the commercial value of the entire deposit—an interest in real property;

2. The determination that 1951 limestone was not "chemical grade" may control such "classification" issue in pending cases for later years. Monolith's refund for such years thus might be reduced, depending on the treatment of gross income from mining;

3. The Treasury Department has taken inconsistent positions in different courts in current depletion cases. A controlling Supreme Court decision in such a case could affect Monolith's refund for later years;

4. The trial court's classification of Monolith's 1951 limestone did not affect its dollar recovery below. However, Monolith would be seriously damaged if the judgment were modified in this case so as to again make the rate of depletion significant.

A prerequisite to a proper appeal is that the appealing party be "aggrieved."

United States v. Adamant Co., 197 F. (2d) 1 (C. A. 9th 1952) cert. den. 344 U. S. 903, 97 L. ed. 698.

"Aggrieved" has been defined by the courts as:

"... Any person having an interest recognized by law in the subject-matter of the judgment, which interest is injuriously affected by the judgment, is a party aggrieved and entitled to be heard upon appeal..."

In re Colton's Estate, 164 Cal. 1, 127 P. 643 (1912).

Even a party who has received the dollar judgment prayed is "aggrieved" in part, and hence may appeal, if he does not obtain all the relief he sought by the judgment.

United States v. Dashiell, 70 U. S. 688, 18 L. ed. 268 (1866);

Houchin Sales Co. v. Angert, 11 F. (2d) 115 (C. C. A. 8th, 1926);

Cochran v. M. & M. Transp. Co., 110 F. (2d) 519 (C. C. A. 1st, 1940);

Galloway v. General Motors Acceptance Corp., 106 F. (2d) 466 (C. C. A. 4th, 1939).

The taxpayer here was clearly “aggrieved” by the judgment below, as such word is used in the law defining a party’s right to appeal, in that such judgment disparages the quality, condition or value of taxpayer’s interest in real property—its limestone. The trial court’s judicial determination of the quality of taxpayer’s 1951 limestone (which was in issue below) will have a direct adverse pecuniary effect on the value of the limestone deposit in the marketplace, as well as in the other tax cases referred to above.

Although this is not a case of slander of title, such cases are helpful, in showing that taxpayer was “aggrieved” and entitled to appeal.

It has been held that disparagement of the quality, condition or value of the plaintiff’s property is actionable. Thus, in *Paull v. Halferty*, 63 Pa. 46, 3 Am. Rep. 518, it was held that where the owner of an iron-ore mine lost a sale because of misrepresentations that the ore would suddenly run out, such statements were actionable.

So, too, it has been held that a taxpayer is entitled to a correct determination of his tax deficiency, without regard to its immediate consequence.

Keeler v. C. I. R., 180 F. (2d) 707, 709 (C. C. A. 10th, 1950).

In the *Keeler* case, the court held that to be an “aggrieved person” entitled to appeal from a Tax Court decision:

“. . . it is not necessary that there be an actual pecuniary loss. The proper test is whether the decision invades the legal rights of a person or operates adversely on his property rights and interests.”

This is the crux of the instant case.

V.

STATEMENT OF ADMITTED AND
STIPULATED FACTS.

A. Taxpayer’s Chemical Process.

It is unnecessary to describe taxpayer’s mining operation in detail. The facts are undisputed, and are set forth in the Findings of Fact [R. 63-69] and the Stipulations of Facts between the parties. [Ex. 1, R. 16; Ex. 8, R. 27; Ex. 19, R. 40.]

The Monolith Portland Cement Company (hereafter called “taxpayer”), is engaged in the business of producing cement. Incident to its production of cement, taxpayer operates a limestone quarry at Monolith, California, from which it extracts limestone, all of which it uses in the production of its cement.

During the entire year 1951 taxpayer mined a calcium carbonate rock generally known as “limestone,” all of which it processed by the usual and customary process steps applied in the cement industry to obtain any of the various types of Portland cement. [F. of F. III, R. 63.]

The production of Portland cement is divided into two divisions: the preparation and physical proportioning of raw materials; and the calcination or heating in a rotary

kiln of such materials. The calcination causes complex chemical reactions which result in the formation of entirely new compounds, primarily tricalcium silicate, dicalcium silicate, tricalcium aluminate and tetracalcium alumino-ferrite. [Stip. of Facts No. 1, R. 18; Ex. 23, pp. 11, 27-28; R. 129.]

The cement industry is universally recognized as a chemical industry in the United States. Dr. R. H. Bogue, Director, Portland Cement Association Fellowship, National Bureau of Standards, in his authoritative book, "The Chemistry of Portland Cement" (2d Ed., 1955, Reinhold Pub. Co., N. Y.) states (p. 37):

"The manufacture of Portland Cement is distinctly a chemical industry and will be treated as a special problem in chemical control."

The Government's witness on limestone, Dr. Oliver Bowles, admitted that Dr. Bogue was the authority in the field. [Ex. 23, pp. 60-62; R. 132-133.]

B. The Chemical Quality of Taxpayer's Limestone.

The actual computed chemical analyses, made approximately each week, of the limestone mined by the taxpayer during the year 1951 revealed an average of 85.20% of calcium carbonate. [F. of F. No. V, R. 64.]

The Government concedes that the process of producing Portland cement, involving calcination and the formation of entirely new chemical compounds, is a "chemical process" comparable to the chemical process which produces lime by calcination of limestone. [*E.g.*, Dr. Bowles' Deposition, Ex. 23, pp. 11, 28, 63; R. 129, 134.]

It is undisputed that limestone, containing comparable amounts of calcium carbonates, is widely used in the

United States to produce cement by chemical process and that such production of cement is the most important chemical process use of limestone, dollarwise and tonnage-wise. [Ex. 23, p. 60; R. 131.]

C. The Chemical Uses of Limestone.

The United States Bureau of Mines, Minerals Yearbook, 1952 and 1953, Tables 30, 31 and 34 [Stip. of Facts No. 2, p. 2, line 30, to p. 6, line 32; Ex. 8] reported the various major uses of limestone in the United States in the year 1951, as follows [R. 29-30]:

LIMESTONE	TONS
(Excluding Lime & Cement)	
Cut, Flagg, etc.	806,842
Riprap	3,101,470
Fluxing Stone	39,929,957
Concrete and Road Metal	112,717,050
Railroad Ballast	9,085,006
Agriculture	19,400,610
Miscellaneous	20,438,880
(Including alkali, calcium carbide, glass, paper mills, supra, poultry grit)	
Subtotal	205,480,000 (Rounded)
CEMENT	64,284,000
LIME	16,511,000
Total	286,275,000 (Rounded)

The three categories in the above tabulation which use limestone in a chemical process are "cement," "lime" and a portion of "miscellaneous."

D. The Testimony of Dr. Oliver Bowles.

Dr. Bowles, on deposition, testified that he had no knowledge of the use of the phrase "chemical grade limestone" in the limestone industry. [Ex. 23, pp. 7-9; R. 122-124.] He expressed the opinion that: "As we interpret it, in the Bureau of Mines, a chemical grade limestone is one that is used for chemical uses such as alkali manufacture, calcium carbide manufacture; in the glass, paper, and sugar industries." [Ex. 23, p. 10; R. 125.] He expressed the further opinion that he would not consider a limestone containing 85% calcium carbonate a chemical grade limestone because he said it was not used by the industries he classified as chemical industries [Ex. 23, pp. 10-11; R. 125-126], and that he did not consider the Portland Cement Industry to be a "chemical industry," "as the term is understood in the Bureau of Mines." [Ex. 23, p. 11; R. 126.]

However, Dr. Bowles admitted that:

(1) The cement industry is a "chemical process industry" although it did not meet his definition of a "chemical industry" [Ex. 23, pp. 62-65; R. 133-135]; there is a complex, chemical reaction in the process of cement manufacture [Ex. 23, p. 11; R. 126] and that the chemical reactions occurring in the cement process were so complicated that the chemists themselves were not quite sure exactly what chemical compounds were formed by calcination [Ex. 23, p. 60; R. 131-132];

(2) For two of the four major uses of commercial limestone—as a flux and for cement or lime manufacture—the chemical composition of the limestone is "all important" [Ex. 23, p. 55; R. 130-131];

(3) He considered that cement was the most important product made from limestone both dollarwise and tonnage-wise [Ex. 23, p. 60; R. 131];

(4) He classified cement under the heading "Uses for which Chemical Properties are Most Important" in his text [Ex. 23, p. 60; R. 131];

(5) He recognized Dr. R. H. Bogue as the authority in the field, and was familiar with Dr. Bogue's treatise "The Chemistry of Portland Cement" a chemistry book on Portland cement [Ex. 23, pp. 60-61; R. 132];

(6) The reason he considered limestone calcined into lime by a chemical process as "chemical grade limestone" and ruled out limestone calcined into cement by a comparable chemical process, was because he believed that limestone chemically processed into lime had a calcium carbonate content of 98% or more, and the limestone chemically processed into cement was much lower in calcium carbonate content [Ex. 23, p. 17; R. 127];

(7) If the cement industry were classified as a "chemical industry," the limestone so used would be a "chemical grade limestone" [Ex. 23, p. 89];

(8) In his publications he had included the cement industry under the heading of the "chemical process industry" along with glass, chemicals, lime, etc. [Ex. 23, pp. 62-63; R. 133-134.]

E. The Record.

The parties stipulated and this Court by order allowed the original exhibits and reporter's transcript of testimony below to be made part of the record before the Court without the necessity of printing them.

ARGUMENT.

“CHEMICAL GRADE LIMESTONE” IS LIMESTONE SUITABLE FOR USE IN ANY INDUSTRIAL CHEMICAL APPLICATION AND THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT TAXPAYER’S LIMESTONE, ADMITTEDLY CALCINATED BY CHEMICAL PROCESS TO PRODUCE CEMENT WAS NOT “CHEMICAL GRADE LIMESTONE.”

A. Statement of the Question Involved.

As set out in the Statement of the Case above, the question involved is whether taxpayer’s 1951 limestone used in its cement process was “chemical grade limestone,” and thus entitled to a percentage depletion at the rate of 15% under Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended.

The question of whether the taxpayer’s limestone is “chemical grade limestone” presents two questions:

- (a) What is “chemical grade limestone”?
- (b) Does taxpayer’s limestone fall within the quality of limestone included in the definition of (a) above?

Question (a) is clearly a question of law—the proper interpretation of the statute and the language used by Congress. Question (b) just as clearly, is a question of fact—which may be resolved by the stipulated facts and the evidence therein, after “chemical grade limestone” is defined as a matter of law.

Thus, the ultimate question before this Court—*i.e.*, whether or not taxpayer’s limestone is “chemical grade” limestone, is a mixed question of law and fact. No citation of authorities is believed necessary to establish that this Court is not bound by the determination of the court below. This is not a case where the taxpayer must overthrow a finding of fact under Rule 52 of the Federal

Rules of Civil Procedure on the ground that such finding is "clearly erroneous." The question "What is chemical grade limestone?" is a question as to which this Court is as qualified as the District Court to express its opinion because the controlling facts are undisputed. Taxpayer submits that any reasonable construction of the statute necessarily results in the determination that the limestone it used in the year 1951 in the production of cement was "chemical grade limestone."

B. The Chemical Character of the Cement Industry.

The cement industry is a chemical process industry comparable to the manufacture of glass, paper, paint, soap, sugar, plastics, dye, ceramics, etc. In order to appreciate the significance of this basic fact, we must review briefly the steps in the cement process, the controls exercised and the quality of the finished product.

The ordinary treatment process normally applied throughout the industry in the United States to produce cement and applied in the normal fashion by taxpayer to produce its cement, were and are, briefly: (a) quarrying and primary crushing of the limestone; (b) secondary crushing and grinding of the crushed limestone, with varying amounts of iron ore and silica rock, to obtain a properly proportioned raw mixture which is stored in silos pending further processing; (c) sintering the raw mixture in rotary kilns to produce cement clinker; (d) grinding the resultant clinker with gypsum or other additives to a fineness comparable to flour; (e) storing the resultant finished cement in silos; and (f) sacking the cement and loading it for shipment to customers, or loading the cement for shipment to customers in bulk.

The sintering process described above in the case of the production of cement, sometimes referred to as calcination, causes complex chemical reactions between the compounds of the raw materials which result in the for-

mation of entirely new chemical compounds. The new chemical compounds are the tricalcium silicate, dicalcium silicate, tricalcium aluminate and tetracalcium aluminoferrite required to obtain cement. The mixture of new chemical compounds formed as the result of such sintering comes from the rotary kiln in the form of cement clinker. Cement cannot be made unless these chemical reactions shall occur and unless the chemical reactions create the new compounds in certain specified acceptable proportions. Such proportions of such new compounds are determined by the proportions of calcium, silica, iron and alumina contained in the raw mixture sintered in the rotary kiln and the specified degree of freedom of certain undesirable impurities found in some limestone.

Cement produced by members of the highly competitive cement industry in the United States must meet rigid, physical and chemical specifications in order to be marketable. These specifications are prescribed by such specification writing bodies as the American Society for Testing Materials, American Association of Highway Officials and the Federal Government.

Limestone, in order to be suitable for use in the production of cement which will meet such specifications, must meet strict requirements as to relative calcium carbonates content and degree of freedom from certain undesirable impurities. The great preponderance of known deposits of limestone in the United States and in California does not contain limestone meeting such strict requirements in commercially exploitable quantities. [*E.g.*, Exs. 12; 15, pp. 5, 11-23.] In addition, it should be noted that even deposits of limestone containing limestone meeting such strict requirements in commercial exploitable quantities, may be of no commercial value for the production of cement because of their distance from the centers of population, for it is uneconomical for a cement plant to be located more than approximately 150-300 miles

from its marketing area, in that the cost of bringing the cement to market exceeds the market value. [E.g., Ex. 15, pp. 36-37.]

C. The Words "Chemical Grade Limestone" Are to Be Given Their Ordinary Commercial Meaning, Not an Academic or Scientific Meaning.

The Report of the Senate Finance Committee (Rep. No. 781, 82d Cong., 1st Sess., p. 38) relating to the provisions of the Revenue Act of 1951 which amended Section 114(b)(4)(A) so as to add chemical grade limestone to the list of minerals subject to statutory depletion provided that

"the names of all the various enumerated minerals are of course intended to have their commonly understood commercial meaning."

This specific direction reinforces the settled case law on this subject, which uniformly holds that the words of the statute are to be given their plain, ordinary commercial meaning, and not an academic, geological or technical scientific meaning.

The Quartzite Stone Company v. Commissioner
30 T. C. 511 (May 29, 1958);

Spencer Quarries Inc. v. Commissioner, 27 T. C.
392 (November 29, 1956);

United States Gypsum Company v. United States,
253 F. 2d 738 (C. A. 7, 1958).

As the court stated in the case of *United States Gypsum Company v. United States*, 253 F. 2d 738 (C. A. 7, 1958) (p. 744):

"It is well established that in interpreting the meaning to be given words used in legislative enactments the words are to be given their known and ordinary signification. The obvious, plain and rational meaning is preferable to a narrow, strained, or hidden

meaning. Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U. S. 552, 560, 52 S. Ct. 211, 76 L. Ed. 484; Torti v. United States, 7 Cir., 249 F. 2d 623.” (Emphasis added.)

In the case of *Marvel v. Merritt*, 116 U. S. 11, 29 L. Ed. 550 (1885), the court held that:

“. . . ‘Mineral and bituminous substances in a crude state, not otherwise provided for, 20 per centum ad valorem tax’ . . .”

were not technical, nor used in other than a popular meaning, and that:

“. . . They are the words of common speech, and as such their interpretation is within the judicial knowledge, and therefore matter of law . . .”

D. Although No Commonly Understood Meaning Exists for the Phrase “Chemical Grade Limestone” the Words “Chemical” “Grade” “Limestone” Are Commonly Understood to Mean Limestone of a Grade or Quality Suitable for Use in an Industrial Chemical Process.

1. The phrase “Chemical Grade Limestone” has no commonly understood commercial meaning.

The phrase “chemical grade limestone” is not defined in any of the standard dictionaries, encyclopedias, literature of the art, or technical references. Dr. Bowles admitted that he did not know if the phrase “chemical grade limestone” was used in any of the industries where limestone is chemically processed [Ex. 23, pp. 7-8; R. 122-123], and that he had never heard the phrase used in the limestone industry. [Ex. 23, p. 9; R. 124.]

The word “chemical” refers of course to the meaning understood and used by the trade or industry using a particular mineral. It is clear that no such meaning as the Government ascribes to the words “chemical grade

limestone” is used in any trade or industry producing or using limestone, as their own witness admits.

Actually, as will hereafter be discussed, when the industry or business refers to limestone of the particular specifications advocated by the Government, it calls for “high calcium limestone.” [*E.g.*, Ex. 15, p. 5; R. 120-121.] Although Congress presumably knew of such limestone, it did not use such term, and instead used the phrase “chemical grade limestone” which is persuasive that another less restrictive meaning was intended.

2. The words “chemical grade limestone” when given their ordinary commercial meaning, refer to a grade of limestone suitable for use in an industrial chemical process.

All limestone is a species of and composed primarily of calcium carbonates, magnesium carbonates, or a mixture of the two. The Government has stipulated that the taxpayer’s rock, in question here, is “a calcium carbonate rock generally known as limestone.” [Stip. of Facts No. 1, para. IV A, R. 18; see also Ex. 15, p. 5.]

Since it is thus undisputed that taxpayer’s rock is “limestone,” the words “chemical” and “grade” must next be given their ordinary commercial meaning.

The word “chemical” has been often defined in substantially the same words:

a. 14 C. J. S. 1102:

“Literally a substance used for producing a chemical effect, or one produced by a chemical process; a chemical agent prepared for scientific or economic use . . .”

b. *Phoenix Ins. Co. v. Fleming*, 65 Ark. 54, 44 S. W. 464, 465, 39 L. R. A. 789 (1898):

“. . . The term ‘chemical’ is defined as a substance used for producing a chemical effect, or one produced by a chemical process; a chemical agent prepared for scientific or economic use . . .”

c. *Stewart v. Robertson*, 45 Ariz. 143, 40 P. 2d 979, 983 (1935):

“. . . The term ‘chemical,’ used as a noun, is defined as ‘a substance produced by a chemical process, or used for producing a chemical effect’ . . .”

d. Webster’s New International Dictionary (2d Ed., 1948):

“. . . (2) Of or pertaining to chemistry; characterized or produced by the forces and operation of chemistry; employed in the processes of chemistry . . .”

These accepted definitions establish that the word “chemical” used as a noun, refers to:

- (1) something produced by chemical process; or
- (2) something used in a chemical process.

In this case, it is undisputed and the Government has stipulated that:

“The calcination or heat treatment (of taxpayer’s process) causes chemical reactions which result in the formation of new compounds between the principal raw materials limestone, clay and iron cinders.” [Stip. of Facts No. 1, para. IV B; R. 18.]

The cement industry is universally recognized as a chemical process industry—that is, an industry utilizing a chemical process to obtain its commercially marketable product, cement. The Government’s only witness, Dr. Bowles, admitted this basic fact. [Ex. 23, pp. 11, 28, 63; R. 126, 129, 133-134.]

Since cement is produced by chemical process, and since limestone is one of the principal raw materials used in such process to bring about “chemical reactions,” such limestone is clearly “used for producing a chemical effect” in the words of the standard definitions of “chemical,”

and is, when suitable for such use, itself a “chemical.” The ordinary meaning lays emphasis on *function* and *use*, as distinguished from composition. In other words, if a mineral is specifically used to produce a desired chemical effect or reaction, it is a “chemical.”

Turning to the word “grade,” we find that it, too, has a commonly understood meaning.

a. Webster’s New International Dictionary (2d Ed., 1948):

“(1) A stage in a process . . . , (2) A position in any scale of rank, quality, or order; . . . (10) *Mining*. The relative value or content of an ore or mineral”

The 1942 edition added the words: “as high grade ore and low grade ore.”

b. The Government below admitted that this was the commonly understood meaning of “grade.”

The word “grade” further modifies “chemical” and clearly means and is commonly understood to mean a substance (here limestone) of a grade, order or quality suitable for a chemical use—that is, employed in a chemical process to obtain a chemical reaction. And it is undisputed that taxpayer’s limestone is of such quality as to meet the existing specification required for cement raw materials, and is so used in the chemical process employed to produce cement.

E. Chemical Grade Limestone Is Limestone Suitable for Use in Any Industrial Chemical Application.

As discussed in the Statement of Facts [p. 13] the uses of limestone are rather well documented. Some 90 million tons are employed yearly in the chemical processes incident to the production of cement, lime, paper, glass, sugar, calcium carbide, etc. The remaining 200 million tons are used for roads, agriculture, fluxing, etc.

The line of demarcation between such chemical process uses and non-chemical process uses is clearly defined. However, any attempt to “refine” the phrase “chemical” is difficult if not impossible, and the line between “chemical process” industry and “chemical product” industry is shadowy and nebulous.

The government, and apparently the court below, construed the words “chemical grade limestone” to refer only to the very high calcium limestone which constitutes a small fraction of the chemical process uses. Taxpayer submits that this was clearly error.

The Court of Appeals for the Sixth Circuit has followed this approach in the recent case of *United States v. Wagner Quarries Co.*, 260 F. 2d 907 (Nov. 14, 1958), affirming the District Court which *inter alia* held that limestone used for cement making is a “chemical purpose” and allowing 15% depletion. The Sixth Circuit Court stated (p. 908):

“The test is not what various purposes the limestone might be used for,—this is conceded, but rather whether it can be found to qualify for chemical or metallurgical purposes.”

In that case the District Court, *inter alia*, ruled that the limestone taxpayer sold to the Medusa Cement Company for making cement was “chemical grade limestone” and entitled to depletion at the rate of 15%. The record disclosed that 40% of such taxpayer’s limestone sold in 1951 was “utilized for chemical and metallurgical purposes” (the court included cement as a “chemical use”) and the remainder was “suitable” for such uses. The District Court (*The Wagner Quarries Company v. United States of America*, U. S. D. C., N. D. Ohio, Sept., 1957, 154 F. Supp. 655), in its opinion, when discussing the intention of Congress, stated (p. 662):

“Certainly they did not have in mind a grade of limestone suitable only for use by an industry that

required extremely high standards such as the limestone mined in the area on the east coast of Michigan between Alpena and St. Ignace, where the calcium carbonate content is 95 percent or more. If this is what the Congress had in mind, then I believe they would have so said, for this grade of limestone is exceedingly scarce and is not readily found in available quantities.”

Lacking a statement of intention or definition from Congress, and lacking a definitive ruling by the Secretary of the Treasury, and absent a commonly understood commercial meaning in the industry of the phrase “chemical grade limestone,” the question of a reasonable interpretation devolves upon the courts.

The taxpayer submits that the only reasonable interpretation follows common sense in the suitability of limestone for use in one of the chemical process industries. Cement is one such industry.

Since the chemical process industries vary in the chemical content of the limestone they require, any sort of a chemical content test would be inequitable and difficult to administer. On the other hand, the fact of suitability for chemical process use is easily ascertained and would promote uniformity of administration. Such an interpretation would fill the gap that now exists between the bare bones of the statute and industry’s need for a clear, workable definition which will enable it to know where it stands.

Parenthetically, it should be noted that a rash of litigation has arisen in the courts over this very point, and cases are pending in other circuits. The litigation is due to the lack of consistent theory of interpretation by the Government which is apparently playing the cases by ear, taking the most advantageous position in each case regardless of consistency and hoping for a conflict in decisions.

Congress corrected this situation for tax years after 1954, by enacting the Internal Revenue Code of 1954, which provided depletion at the rate of 15% for *all* limestone except that used for aggregate, road building, etc.

F. The Government's Suggested Interpretation of "Chemical Grade Limestone," Apparently Adopted at Least in Part Below, Is Artificial, Arbitrary and Unreasonable.

The Government sought below to limit the term "chemical grade limestone" to limestones having a certain artificially specified minimum percentage (95%) of calcium carbonates content by grafting the words "high calcium" onto the statutory phrase "chemical grade limestone." Such a position is arbitrary, unwarranted by the statute, and places a gloss upon the statute which Congress never intended.

The trial court below, while holding that taxpayer's limestone was not "chemical grade" rejected the Government's "high quality" test [F. of F. No. XVI, R. 67] and held merely that "a limestone of a relatively high calcium carbonate content is known in industry and commerce as chemical or metallurgical grade limestone," but refused to specify how high was "high." The only evidence as to the use of the phrase in industry was that the industry had never used it.

Taxpayer submits that such an arbitrary 95% calcium carbonate test, or any percentage test, ignores the admitted and proven circumstance that the value of particular limestone in the production of cement and other chemical process uses lies, not only in its calcium carbonate content, but also in the degree of absence of undesirable *impurities*.

The words "impure," "pure" and "impurities" should be correctly understood. Webster's New International Dictionary (2d Ed., 1948) defines the terms as follows:

"Pure . . . 1. a. Separate from all heterogeneous or extraneous matter."

"Impure . . . not pure; spec.: . . . b. mixed or impregnated with something extraneous . . ."

"Impurity . . . condition or quality of being impure."

"Extraneous" is defined as "not essential or extrinsic."

Thus, we see that aside from its use with reference to food or drink, etc., as in "pure milk," or in connection with single elements, like "pure gold," "pure iron," etc., the word "pure" is a statement of a physical fact which may or may not be meaningful when applied to a particular chemical compound or substance. An illustration would be "pure" silver, which although more valuable than "sterling" silver is not useful commercially because of its softness.

Thus, the question of "impurities" is relative, rather than absolute. What is an "impurity" in a particular material for one chemical process or use, may be beneficial to another chemical process application, and what is beneficial to the former application or use, may be an "impurity" to the latter. The question of what is an "impurity" is not, in this reference, a constant, but is a variable based upon whether the substance in question is essential to or is extraneous to such chemical process. If it is extraneous, it is an "impurity." If it is essential to the chemistry it is a constituent element and forms one of the specifications for the desired raw material used in the process.

Applying this helpful analysis to the instant case, and comparing specifications for the two chemical industries—the alkalies and glass [Stip. of Facts No. 2, para. 14; R. 35-36] we find that a maximum of 1% iron oxide (Fe_2O_3) is permitted for some glass manufacture, while 3% is permitted in manufacturing alkalies. The limestone used for alkalies is thus clearly unsuitable for glass—although the Government contends both are “chemical grade limestone”—since the extra 2% of iron oxide permitted in alkali manufacture is a contaminant or “impurity” which would ruin the finished glass.

The arbitrary and artificial character of a percentage analysis or content test to determine “chemical grade limestone” is thus clearly exposed. In practical language—“one man’s meat is another man’s poison”; or, what may be a permissible calcium carbonate content for one chemical use may bar another equally recognized chemical use because of differing specifications.

As discussed, cement is produced by a complex chemical process, wherein, through extensive chemical changes in the constituent raw materials, entirely new chemical compounds are created. [R. 18, 129.]

In this regard, it is interesting to note that the Government has laid stress upon its contention that limestone used for the manufacture of cement is of an asserted “lower quality” than the limestone used, for example, to make glass. Such an approach begs the question. For the glass industry, like the cement industry, is a chemical process industry. It is true that the limestone commonly used to make glass has a different chemical composition than the limestone commonly used to make cement. The *specifications* for each chemical process (cement and glass) are *different*, but neither can be said to be of *higher quality* than the other. The attempted comparison is like attempting to compare orange juice and lemon juice, and saying that because orange juice

contains 1.35% citric acid and lemon juice contains 6.5% citric acid, that orange juice is “purer” or of higher quality than lemon juice.¹

The fact is that while the two fruit juices are different and each is unique, both are “commercial grade citrus juices.”

So it is with the cement industry and the glass industry. Both are chemical process industries. Both use limestone as a basic raw material. The specifications for the chemical content of such limestones are different because the other constituent raw materials and the end product are different in each case. However, it is patently error to say that glass limestone is “purer” or of “higher quality” than cement limestone. Both types of limestones have closely defined chemical contents, and both are used in a chemical process, combining with other raw materials to produce entirely new chemical compounds. Both, in short, are “chemical grade limestone.”

G. The Government’s Artificial 95% Theory Is Inconsistent With Administrative Practice.

In Revenue Ruling 56-582 (C. B. 1956-2, 981), the Commissioner defined the word “lime” as used in Revenue Ruling 55-700, relating to the percentage depletion of limestone, as follows:

“The word ‘lime’ as used in the penultimate paragraph of Revenue Ruling 55-700, C. B. 1955-2, 369, means calcium oxide (CaO) manufactured by calcination of calcium carbonate (CaCO₃). Since such calcination is a chemical process, any natural deposit, including dolomite, which contains calcium carbonate and is used, or sold for use, by the mine owner or

¹“*Food Products*” Blumenthal Chem. Pub. Co. Brooklyn, N. Y. 1947, p. 758.

operator for manufacturing calcium oxide (lime) by calcination is 'chemical grade limestone' for percentage depletion purposes"

The crux of the ruling is that "calcination," is a "chemical process" and that therefore, limestone of *any* calcium carbonate content, which is calcined; or chemically processed, is defined as "chemical grade limestone."

The heart of the Portland cement process is the calcination or "burning" by which, under extreme heat (2400-2800° F) the carefully proportioned raw materials are broken down and converted by chemical reaction into entirely new compounds. [R. 18.] The Government must admit and does admit that if "calcination" in the manufacture of lime is a "chemical process," that the calcination of cement raw materials is a "chemical process." The Government must inevitably next admit that such calcination and formation of chemical compounds in the kiln, constituting a "chemical process," is the stage at which one can determine that a particular limestone is "chemical grade limestone" as shown in the Ruling. In other words, if the particular limestone in question is suitable for calcination and is calcined, then by definition it is "chemical grade limestone" and, of course, the Government has stipulated in this case that all taxpayer's limestone in the year 1951 was calcined and that such calcination resulted in the production of Portland cement. [R. 18-19, 26.]

To date, the Government has offered no reasonable explanation why it defines limestone which is calcined into lime by a "chemical process" as "chemical grade limestone" but refuses to concede that limestone which is calcined by a comparable "chemical process" into Portland cement is also "chemical grade limestone," except the purely artificial test or theory that the limestone used for lime is allegedly "higher grade." However, it should be noted that nowhere in the quoted Ruling is there the sug-

gestion that the ultimate classification of "chemical grade limestone" depends upon the "quality" of limestone expressed in terms of carbonates content. The Ruling is phrased and framed upon the proposition that the chemical conversion of the limestone into new compounds by calcination is the criteria for determining whether or not particular limestone is in fact "chemical grade limestone."

H. The Provision of the Statute Providing That "Chemical Grade Limestone" Be Allowed a 15% Depletion Allowance Is Specific and Free From Ambiguity.

As heretofore discussed, for the reasons stated, taxpayer submits that the words "chemical grade limestone" are clear and unambiguous, and that the arbitrary and artificial 95% test standard or theory adopted and pressed by the Government below has no support in fact or in law.

The Government's 95% theory has no support in fact because, as discussed above, limestone of varying calcium carbonate content is extensively used in the different chemical industries. The particular industry and the end product determines the required specification for calcium carbonate content. As discussed, the presence or absence of other materials in varying percentages is a function of the particular chemical process or product, and does not reflect an acceptance or understanding by the industry that a particular type of limestone is "chemical grade limestone," which, because of a lack of need generally in industry for the use of this expression, does not have a "trade significance." Still, such English words used separately in industry are clear and unambiguous.

Had Congress intended to limit the 15% depletion rate to limestone containing 95% calcium carbonate or more, it could easily have used the words "high calcium limestone."

The Government, however, is attempting to forcibly transpose "chemical grade limestone" into "high calcium limestone," and, thus add a new dimension to the statute unintended by Congress.

This is yet another illustration of the old saying—"The big print giveth, and the fine print taketh away"—the big print here being the statute and the fine print being the Government's attempted gloss or "improvement" on the statute—not even by Regulation, but by the expediency of litigation.

The Government's 95% theory has no support in law, in that there is nothing in the statute or in its legislative history which tends to show any intention of Congress that "chemical grade limestone" was a "special," "refined," or "limited" type of limestone usable and suitable in some chemical industries but not in others.

In any event, the provisions of the statute involved are specified and free from ambiguities. In such a situation there is no room for an interpretation by the Commissioner or by the Courts which would vary downward the stated rate of 15% for limestone which is suitable for use in any chemical process industry, and hence is, by definition, "chemical grade limestone."

I. The Internal Revenue Code of 1954.

We have appended to this brief (Appendix "A") the pertinent provision of the 1954 Code relating to percentage depletion, although the Court will understand, as did the District Court, that the decision of the issues in this case involves only the calendar year 1951, and that the years subsequent to years 1953 are governed by the 1954 Code, and are in no way affected by the decision in this case.

In the 1954 Code, Congress adopted a modified end-use test, in that although "limestone" is given a 15% rate of depletion, the mine owner is entitled to only 5% when

such limestone is used or sold for use as riprap, ballast, road material, rubble, concrete aggregates, or for similar purposes. Thus, under the 1954 Code, if limestone is used for any purpose other than those just stated, it is entitled to the 15% depletion rate.

Although, as stated, the 1954 Code is not applicable here, it is interesting to note that Congress has clarified the depletion provision of the statute, and, by adopting the modified end-use test has clearly provided that *all* limestone used in any chemical process industry (including cement), regardless of calcium carbonate content, and regardless of the content of other substances, is entitled to the 15% rate.

Congress was, no doubt, aware of the controversy between the industry and the Government as to the proper interpretation of "chemical grade limestone." Congress clearly rejected the end-use test proposed by the Government in T. D. 6031 (C. B. 1953-2, p. 121) and also rejected the 95% calcium carbonate content test pressed by the Government herein, and instead adopted the practical line or division between the limestones actually used in the chemical industry of all types, and the limestones used for the inferior purposes, such as road building, etc., set forth in the statute.

J. The Testimony of Dr. Bowles Demonstrates That His Definition of "Chemical Grade Limestone" Arises From a Misapprehension of What Makes an Industry Chemical or Non-chemical.

The gist of Dr. Bowles' testimony is that "chemical grade limestone" is limestone used by "chemical industries" and an industry is a "chemical industry" *only if* it uses "chemical grade limestone." There is no break in this circle of reasoning, and it bears no relation to the objective, demonstrated actual fact that there are indus-

tries commonly classified as chemical industries, which use limestone other than the high calcium limestone Dr. Bowles believes to be “chemical grade.”

Dr. Bowles’ testimony is thus clear that his interpretation of “chemical industry” was tailored to fit. Instead of a reasonable classification based upon the chemical character of the processes used, or the chemical character of the products produced, Dr. Bowles classified industries as “chemical” or “non-chemical” solely upon the calcium carbonate content of the limestone they used, thus excluding admittedly chemical process industries such as cement.

Such a position is demonstrably fallacious. First, it involves circuitous reasoning. Dr. Bowles reasons:

1. “Chemical industries” are only those which use high calcium carbonate limestone;
2. Only limestone used by “chemical industries” is “chemical grade limestone”;
3. Therefore, only high calcium carbonate limestone is “chemical grade limestone.”

Obviously, Dr. Bowles’ major premise is unsound. Factually, an industry is chemical or non-chemical because of its processing or because of its product, or both, not because it utilizes one particular material in specified proportions.

K. Conclusion on “Chemical Grade Limestone.”

For the reasons stated, taxpayer submits that this Court should define “chemical grade limestone” to include limestone suitable for use in the industrial chemical process of making cement, and in all other respects affirm the judgment below.

VII.

THE GOVERNMENT'S CROSS-APPEAL.

By its cross-appeal herein the Government has attempted to present two issues for determination:

1. It attempts to repudiate its stipulations made and positions taken below which support the trial court's findings relating to the exclusion of the costs of bagging from the ordinary treatment processes for percentage depletion purposes; and,
2. It attempts to repudiate its stipulations made below which support the trial court, and challenges the trial court's inclusion of the costs of mineral materials necessarily added to its limestone in order to obtain finished cement.

A. The District Court Committed No Error in Ruling That Appellant's Bagging Operation Should Be Excluded From the Ordinary Treatment Processes for Percentage Depletion Purposes nor in the Method It Ruled Should Be Used in Computing Such Exclusion.

1. The District Court's Findings on Bagging Issue.

The relevant and pertinent findings of fact and conclusions of law with regard to the bagging question are as follows:

Finding of Fact IV.—At the completion of the processes referred to above, the cement was stored in silos from which *it was loaded and shipped in bulk; or from which it was bagged and loaded and shipped in bags.* (Emphasis added.)

Finding of Fact VI.—The only product sold by plaintiff during the year 1951 as a result of its limestone mining operations was *Portland cement in bulk and in bag or sack containers.* (Emphasis added.)

Finding of Fact IX.—During the year 1951, 63.49% of plaintiff's cement sales were of bulk cement. *The remaining sales were of cement placed in bag or sack containers.* (Emphasis added.)

Finding of Fact XI.—The commercially marketable mineral product obtained by plaintiff from mining during the year 1951 was *bulk Portland cement* at its plant at Monolith, California. (Emphasis added.)

Finding of Fact XII.—*The cost of bags and sack containers and the costs attributable to bagging and sacking are not ordinary treatment processes* normally applied by mine owners or operators to obtain the commercially marketable mineral product Portland cement in bulk form. (Emphasis added.)

Finding of Fact XIII.—*The additional charge made by plaintiff on its sales of Portland cement sold in containers is to be eliminated* from its gross sales in order to arrive at "gross income from mining." Also to be eliminated from gross sales are royalties, trade discounts, contract trucking and own fleet trucking costs, rail freight, and warehouse and bulk storage plant costs at distribution points away from plaintiff's cement plant. (Emphasis added.)

Finding of Fact XIV.—In computing net income from mining, the following items are to be eliminated from expenses: trade discounts, contract trucking and own fleet trucking costs, rail freight, warehouse and bulk storage plant costs at distribution points away from plaintiff's cement plant, and *cost of bags and costs attributable to bagging.* (Emphasis added.)

Conclusion of Law V.—The commercially marketable mineral product obtained by plaintiff was *bulk Portland cement at its plant in Monolith, California*, located within a distance of fifty (50) miles from the quarry operated by plaintiff. (Emphasis added.)

Conclusion of Law VI.—Plaintiff is entitled to a depletion allowance at the rate hereinabove set forth on its gross sales of bulk cement f.o.b. its plant at Monolith, California, but adjusted for the items as set forth in the findings of fact herein and limited to fifty (50) per centum of the net income for mining as adjusted for the items as set forth in the findings of fact herein. (Emphasis added.)

Conclusion of Law VII.—Bagging and costs attributable to bagging are not ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product bulk Portland cement. (Emphasis added.)

Conclusion of Law X.—The items of royalties, trade discounts, trucking (contract and own fleet costs), rail freight, warehouse and bulk storage plant costs at distribution points away from plaintiff's cement plant, *additional charge for sales in bags, costs of bags and bagging expense are to be eliminated from gross sales from mining and from net income from mining* as set forth in the findings of fact herein. (Emphasis added.)

2. The Government's Claimed Error on Bagging.

Appellee now specifies (in its cross-appeal) error by the District Court with regard to the bagging question with the designation of the following point upon appeal:

“The District Court erred in determining that the taxpayer, in computing its ‘gross income from mining’ of calcium carbonate, is entitled to exclude the cost of bags in which the cement is sold and the cost of the bagging process.”

This designation by the appellee is unclear and ambiguous when considered with the District Court's findings of fact and conclusions of law (see findings of fact and conclusions of law quoted above).

3. The Government Is Attempting to Change Its Trial Court Theory on Bagging.

Appellant presumes appellee has no objection to the findings of fact and conclusions of law which declare the bagging process is not an ordinary treatment process, because: (1) appellee acquiesced in the principle of excluding the bagging process in the proceedings below; and (2) in all other reported cases relating to percentage depletion, appellee has taken the position, where containers are involved, that the process applied to place a product in containers is not an ordinary treatment process for percentage depletion purposes.

a. APPELLEE ACQUIESCED IN THE EXCLUSION OF BAGGING PROCESS.

Appellee obtained several delays of the trial upon stipulations [Exs. 25, 27 and 24] which represented to the court that principles for settlement had been agreed upon. One of these principles was that the bagging operation or process applied by appellant should be excluded from the ordinary treatment processes in the computation of percentage depletion. (See Exhibits attached to Affidavit *in re* March 17, 1958 Hearing [Clk. Tr. pp. 402-421].)

During the trial the appellee persisted in the position that the bagging process should be excluded. This is shown by the following excerpt from the Reporter's Transcript:

(1) Reporter's Transcript of March 21, 1958, page 92, line 18, to page 93, line 16 [R. 99-100]:

"The Court: Do you contend that bags and bagging should be included?"

Mr. O'Brien: Your Honor, I am only trying to inquire—

The Court: No. Answer that question, and then we can talk. I am not interested in some academic theory. I am interested in the real controversy.

If the Government doesn't contend that this should be included, if you are both agreed upon it, let's drop the subject .

Mr. O'Brien: Well, in principle, the Government would agree with the theory—

The Court. All right. Let's drop the subject. Step down, Mr. Neuhauser. Call your next witness. Let's move on.

Unless you have something more?

Mr. O'Brien: Well, if the witness would stay here for a second, your Honor, and let me please try to explain the problem as we see it.

We have an over-all operation of this cement business, where the loss on the bagging operation, taxpayer wants to exclude as non-mining cost all of the costs on the non-mining cost basis. Therefore, he is increasing his percentage depletion allowance by eliminating this cost.

The Court: Yes. But you are agreeing with him.

Mr. O'Brien: In principle."

And again, on the following day in court, appellee's counsel conformed to this position:

(2) Reporter's Transcript of March 24, 1958, page 171, line 24, to page 172, line 14 [R. 113]:

"The Court: The question is, will the bagging stage be included, or is the cut-off point at which the cement becomes marketable short of the bagging stage? And you have agreed that it is? Both sides have agreed that it is?

Mr. O'Brien: Yes.

The Court: And it so happens that by so agreeing in this situation the figures on the books are such that it causes this loss and that it adversely affects the Government when dealing with those figures.

What I have suggested is that the true situation is shown by not dealing with bags and bagging figures at all. Deal with figures that don't appear on the books; namely, the figures that would exist if all this cement had been sold in bulk as the cut-off point. And when you do that, you don't even talk about these costs and 40 cent recovery and so forth, do you?"

Appellant submits it is clear appellee's position during the trial of this action in the District Court below was that appellant's bagging operation or process should be excluded from the ordinary treatment processes for percentage depletion purposes, because such process is not a part of "mining" within the scope of the percentage depletion statutes.

b. APPELLEE HAS NEVER TAKEN POSITION CONTAINERS SHOULD BE INCLUDED.

In all actions to date relating to the percentage depletion statutes involved herein, appellee has consistently taken the position any process or processes pertaining to the placing of a product of a mine in containers is not an ordinary treatment process within the scope of the percentage depletion statutes. See:

Dragon Cement Company v. United States (June 23, 1958, U. S. D. C., Me.), 163 Fed. Supp. 168;

United States v. Utco Products, Inc. (June 10, 1958, C. A. 10th), 257 F. 2d 65;

American Gilsonite Company v. Commissioner of Internal Revenue (April 29, 1957), 28 T. C. 194;

Townsend v. Hitchcock Corp. (April 9, 1956, C. A. 4th), 232 F. 2d 444;

International Talc Co. v. Commissioner of Internal Revenue (1950), 15 T. C. 981; and

New Idria Quicksilver v. Commissioner of Internal Revenue (Sept. 22, 1944, C. A. 9th), 144 F. 2d 918.

In not one of these cases involving the percentage depletion statute involved herein has appellee ever taken the position that a process relating to the placing of a product in containers is includible within the ordinary treatment processes.

It is clear appellee not only failed to make an issue of appellant's exclusion of the bagging process from its ordinary treatment processes, but, in fact, never intended to take such a position. To permit appellee to now take that position and, on this appeal, treat it as an issue in the case is prejudicial and unfair to appellant.

4. The Trial Court Found as a Fact That the Bagging Process Was Excludible. The Evidence Clearly Supports Such Finding.

Even if appellee is permitted to change its theory and to now take the position on this appeal that the bagging process applied by the appellant should be included within the ordinary treatment process under the percentage depletion statutes, its position is without merit and contrary to the undisputed evidence.

In the *Dragon*, *Hitchcock*, *International Talc* and *New Idria* cases, cited above, the bagging or packaging processes were held to be includible within the ordinary treatment processes referred to in the percentage depletion statutes. However, the facts involved in those cases were substantially different from the facts in this present action. In each of those cases the container question was treated as a question of fact, and it was established that it was necessary for the taxpayer to package

his product from the mine in order to market it. Only in the *Dragon Cement Company* case (163 Fed. Supp. 168, 172), where about 50% of the products was sold in bags, did the taxpayer market less than all of the particular product in such packages or containers. In the *American Gilsonite* case (28 T. C. 194, 198), none of the crushed gilsonite was sold except in containers. In the *Hitchcock* and *International Talc* cases (232 F. 2d 444 and 15 T. C. 891), none of the pulverized or powdered talc or talc crayons were sold except in containers. And, in the *New Idria* case (144 F. 2d 918), none of the mercury was sold except in containers.

In the case under consideration here, the product sold in containers (cement) was also sold without the containers. In fact, 63.49% of the product was sold without containers during the year involved. [Finding of Fact IX, R. 65.]

The important principle established by the cases holding that a packaging process should be included is the principle that the packaging question is a question of fact. It is a question of whether the process or processes of placing the product of a mine in packages or containers is an ordinary treatment process normally applied by mine owners or operators in order to obtain the commercially marketable product. That question was answered in the negative by the District Court below in this action. The court's conclusion is supported by the undisputed evidence.

Witness Gillette testified as follows, in respect of this question:

1. Reporter's Transcript, March 21, 1958, page 119, line 18, to page 120, line 19 [R. 109-110]:

"Q. By Mr. O'Brien: The principal market that Monolith has is for bulk sales, according to your Exhibit No. 31. Is that true? A. Yes. In 1957 our shipments were 76.89 per cent bulk.

Q. And for the year 1951? A. 63.49 per cent bulk.

Q. And what were the percentages for bagged cement for the year 1951? A. Well, the difference, which would be 36.51 per cent.

Q. And for the year 1957? A. 23.13 per cent.

Q. For the cement industry that comprises your competitors that you previously described, are your percentages fairly representative of the market conditions? A. Yes, I think they are. Because if you will note, most of the construction nowadays is furnished by transit mix dealers. Now, your transit mix people receive cement in bulk. And so, all the cement that is sent by transit mix—all the concrete that is sent by transit mix has been previously shipped to that dealer in bulk. They do it because of the ease of handling, reductions of cost. And, of course, your labor costs are playing quite a factor in it, now. There was a time when we handled things by hand, but it just—nowadays most everything is handled in bulk, as far as you can.”

Exhibit 31 [R. 140] shows the proportion of appellant's bulk and sacked sales during the years 1951 to 1957. From this evidence alone, the trial court could draw the inference that the marketable product was bulk cement. It did draw such an inference, based on the fact that appellant could have sold its entire output of cement in bulk.

To summarize this testimony, appellant's marketable product was bulk cement without packages or containers. It did market some cement in bags, but under the evidence could have marketed all cement in bulk.

In the *Dragon Cement Co.* case (163 Fed. Supp. 168), the court stated (p. 172):

“. . . During the tax period here involved approximately 50% of taxpayer's cement was actually sold

in bags, and it must be inferred from the stipulation that it could only be so sold. Without such packaging the record thus establishes that approximately one-half of plaintiff's product cannot actually be considered to be commercially marketable. Insofar as that portion of this taxpayer's market is concerned, therefore, the bagging procedure is an ordinary treatment process normally applied and essential for the marketing of the mineral product."

Consequently, the inference is not, as in the *Dragon* case (where 50% was sold in bags), that such cement could only be so sold. Rather, the trial court properly drew the inference that the appellant's marketable product was bulk cement, because but 36% was sold in sacks in 1951, which had dwindled to 23% in 1957.

In the *Utco Products* case cited above, the Court of Appeals for the Tenth Circuit excluded the bagging process from the ordinary treatment processes for percentage depletion purposes. That court appears to have considered the bagging issue as a question of law. If it had considered it a question of fact, it would have undoubtedly included the bagging process because it was clear the product involved (expanded perlite) had to be packaged in order to be marketed. There was no market for the perlite in bulk. (257 F. 2d 65, 66.)

The Tenth Court stated as follows (257 F. 2d 65, 68):

"We are of the opinion that the phrase 'ordinary treatment process,' except where the statute otherwise provides, means a process of treating which separates the mineral from other minerals in which it is found or with which it is associated, or which effects a chemical or physical change in the mineral itself, such as crushing, separating, removing impurities, pulverizing, hardening and the like.

“When the perlite has been expanded it requires no further change, either physical or chemical in the mineral itself or any separation from other matter to render it marketable. Clearly, placing the material in bags effects no change in the mineral itself and is not an ordinary separation process.”

In the *American Gilsonite* case (28 T. C. 194, 198), none of the crushed gilsonite was sold in bulk. All was sold in containers. Although the Tax Court held the packaging process includible, its decision was reversed by the Court of Appeals (September 25, 1958, 259 F. 2d 654) upon the authority of the Court's decision in *United States v. Utco Products Inc.*, 257 F. 2d 65 (June 10, 1958, C. A. 10th).

In the case of appellant's mineral product, after the fine-grinding of the finished cement, no further change, either physical or chemical, is required “to render it marketable.”

Whether the bagging issue is treated as one of fact or law, no error was committed by the District Court below in ruling for the exclusion of appellant's bagging process from the ordinary treatment processes that are normally applied in order to obtain the commercially marketable product, and the undisputed evidence supports such findings.

If appellee is not taking the position that the District Court below erred in excluding appellant's bagging process from the ordinary treatment processes, it is presumed appellee's second point on appeal raises some issue as to the method of computing the exclusion agreed to or acquiesced in.

5. Method of Excluding Bagging Process From Percentage Depletion Computation.

The point on appeal asserted by appellee is that there was error in excluding “the cost of bags in which the cement is sold and the cost of bagging process” in the com-

putation of "gross income from mining." The court below did not make such a determination. Instead, the court held: (1) that the additional income received by appellant by reason of selling cement in bags should be excluded from total income in order to determine "gross income from mining" under the percentage depletion statutes [Finding of Fact XIII; R. 65; Conclusion of Law X; R. 72]; and (2) that the additional expenses incurred by appellant by reason of preparing cement for sale in bags rather than in bulk should be excluded from the total mining expenses in order to determine the "net income from mining" under the percentage depletion statutes [Finding of Fact XIV; R. 66; Conclusion of Law X; R. 72.] The effect of these rulings of the court below is merely to take the bagging operation completely out of the percentage depletion picture, to treat appellant's whole operation as though the bagging operation or process was no part of "mining," or, to treat appellant's operation as though all sales were in bulk. As the District Court stated:

"What I have suggested is that the true situation is shown by not dealing with bags and bagging figures at all. Deal with figures that don't appear on the books; namely, the figures that would exist if this cement had been sold in bulk as the cut-off point." [Rep. Tr. of March 24, 1958, p. 172, lines 8-12.]

and,

"They (bagging income and expenses) are not in the computation at all, as I view it." [Rep. Tr. of March 24, 1958, p. 174, lines 20-21.]

Appellant contends the method suggested and ruled by the District Court below is the only feasible and practical manner of excluding an operation or process from other operations or processes in order to arrive at a conclusion relative to the group of operations or processes remaining.

This is a type of cost-accounting question in that it asks for a dollar analysis of a part of the whole. To exclude any operation or process by any method other than the one where all the income and expenses attributable thereto are excluded or eliminated, would be unrealistic and arbitrary.

The evidence is undisputed that the income received by appellant from bags is \$389,350.00, or .40¢ per barrel of cement sold in bags. [Ex. 29; Rep. Tr. of March 21, 1958, p. 55, line 4, to p. 56, line 18 [R. 78]; p. 77, lines 12-15 [R. 91]; p. 88, lines 19-23 [R. 96]; p. 90, lines 1-13 [R. 97]; p. 107, lines 11-21 [R. 106]; p. 108; lines 17-21 [R. 107].] When appellant sells cement in bags it adds 40¢ per barrel to the price normally charged for cement sold in bulk. Therefore, if the income attributable to the bagging operation or process is to be excluded from the income relating to other operations and processes, it is a simple matter of deducting 40¢ times barrels of cement sold in bags (\$389,350.00) from the total income from all operations. This is the method followed by the District Court below. [Finding of Fact XIII; R. 65.]

The evidence is likewise undisputed that the expenses incurred by appellant in selling cement in bags rather than in bulk are \$771,119.85 [Ex. 29; Rep. Tr. of March 21, 1958, p. 56, line 19, to p. 60, line 11 [R. 79-82].] This figure includes \$344,917.73, incurred by appellant in purchasing the bags actually used, and \$426,202.12, incurred in the process of placing and loading cement into the bags. It is true, that the \$426,202.12 relating to the process of loading and placing cement in bags is an apportionment of overhead expenses and the total expenses incurred by appellant in its packing and loading department (which includes the loading of bulk cement) but appellant's evidence (the only evidence) was that the apportionment made was reasonable if not conservative. [Rep. Tr. of March 21, 1958, p. 56, line 19, to p. 60, line 11 [R. 79-82].] The trial court alone should and did determine

the question. Therefore, if the expenses attributable to the bagging operation or process are to be excluded from those expenses relating to other operations and processes, it is a simple matter of deducting the cost of the bags used and the cost of packing and loading the cement into bags from the total expenses relating to all operations. This is the method followed by the District Court below. [Finding of Fact XIV; R. 66.]

The result in the present action is that appellant's "net income from mining" for percentage depletion purposes is greater than appellant's net income from all its operations. This apparently is the objection which the appellee has to the lower court's method of computing percentage depletion. Appellee seems to believe it impossible for a business organization to realize a loss upon one operation or transaction while realizing a profit on other operations or transactions. Actually, this is probably the history of all business.

In any event, the profits or losses in the process step departments is a pure question of fact. Witness Neuhauser stated [Rep. Tr. of March 21, 1958, p. 98, lines 20-25 [R. 105]]:

"Well, if we were accounting, Mr. O'Brien, for departments and profitability of departments, I wouldn't take the income of one department and apply it against the loss of another department. The purposes of departmental accounting would be to see what departments are producing income and what departments are producing a loss."

Appellant believes that appellee realizes there is only one sound and fair method of excluding the bagging process from the percentage depletion computation, and that is the method adopted by the District Court below. It is a mere fortuitous circumstance that the application of this method is disadvantageous to the appellee in this case,

when the 50% of net income limitation is applied. In fact, all taxpayers who are not subject to the 50% of net income limitation would lose to the benefit of the Revenue Department.

B. The District Court Committed No Error in Ruling That There Should Be No Exclusion From Mining Income or Mining Expenses by Reason of Appellant's Adding Certain Mineral Materials to Its Limestone in Order to Obtain Finished Cement.

The Government, by its Statement of Points on Appeal [R. 148], now asserts that when determining taxpayer's "gross income from mining" the trial court erred in failing to exclude an arbitrarily assumed income attributable to the other minerals necessarily admixed with limestone in the usual and necessary process steps of producing cement.

By this assertion, the Government attempts to repudiate its definitive written stipulations deliberately made below, and challenges the trial court's relevant Findings of Fact.

The Government is now barred from reversing its trial court theory under familiar principles of appellate review. In addition, even if it could now successfully repudiate its stipulations, it would still carry the heavy burden of showing that the trial court's Findings of Fact were clearly erroneous. And this, on the undisputed record, it cannot do.

The only possible basis for excluding "additives" from the computation of "gross income from mining" in this case would be by virtue of a finding of fact that the addition of such other materials to taxpayer's limestone are not "ordinary treatment processes normally applied . . . in order to obtain the commercially marketable mineral product . . ."—finished cement.

For if the addition of such materials is an “ordinary treatment process,” the statute clearly and unequivocally directs that such items are includible in “gross income from mining.” (Sec. 114(b)(4)(B).)

1. The Government’s Point.

Appellee now specifies (in its cross-appeal) error by the District Court with regard to the materials added by taxpayer to its limestone and the trial court’s failure to make exclusions therefor with the designation of the following point upon appeal:

“1. The District Court erred in determining that the taxpayer, in computing its ‘gross income from mining’ of calcium carbonate, on the basis of which a 10% depletion deduction is allowable under 1939 Code Sections 23(n) and 114(b)(4), is entitled to include income attributable to other products (‘additives,’ some of which were purchased and some mined by taxpayer) which it combined with the calcium carbonate in order to manufacture and sell Portland cement.”

By this designation, the appellee apparently contends that those processes involving the addition of relatively small amounts of other materials should be excluded from the computation of percentage depletion. In addition, it appears that appellee would restrict its proposed exclusion to matters of income only without at the same time excluding the expenses attributable to the additives.

2. The Government’s Stipulations Below Bar Such Point on Appeal.

The appellee stipulated that those steps or processes applied by appellant where the other materials are blended with limestone are includible in determining gross income from mining as follows [Stip. of Facts No. 1, para. VIII, H; R. 21, 22]:

“The parties to this action agree that the extraction and processing operations set forth below for the mining of the calcium carbonate rock generally known as ‘limestone’ are includable in determining gross income from mining under section 114(b) of the Internal Revenue Code of 1939, as amended, and were employed by plaintiff at its quarry and cement plant at Monolith, California, during the year 1951 in order to obtain various types of Portland cement.”

* * * * *

“H. The limestone from its hopper is then blended with clay # 1 from another hopper, with clay # 2 from another hopper and with iron cinders from another hopper by measuring and conveying equipment.”

The Government also stipulated that the addition of gypsum at the finish grind stage was included in the ordinary treatment processes normally applied in the cement industry. [Stip. of Facts No. 1, paras. IX, B and X; R. 23, 24.]

In addition, the parties to this action stipulated to the minute physical and chemical details concerning the additive materials [Stip. of Facts No. 1, paras. V-VII; R. 18-21]; and that all steps or processes applied by appellant in order to obtain finished cement are the usual and customary process steps applied in the cement industry to obtain finished cement. [Stip. of Facts No. 1, para. X; R. 24.]

It is obvious then that appellee is not now in a position to argue that the processes or steps relating to the addition of other materials to limestone are not ordinary treatment processes within the meaning of Section 114(b)(4)(B) of the Internal Revenue Code of 1939.

3. Following a Full Consideration, the Trial Court Found the Addition of "Additives" to Be Usual and Customary or "Ordinary Process Steps Normally Applied" to Obtain the Marketable Product Cement From the Limestone Mined.

The relevant and pertinent Findings of Fact and Conclusions of Law with regard to the additive question are as follows:

Finding of Fact III.—During the entire year 1951 plaintiff mined a calcium carbonate rock generally known as "limestone," which it processed by the usual and customary process steps applied in the cement industry to obtain any of the various types of Portland cement. Said processes were applied by plaintiff at its cement plant at Monolith, California, adjacent to the quarry from which plaintiff mines the limestone. The process of heating or calcining of the materials used by plaintiff caused chemical changes to occur in them to obtain cement.

Finding of Fact VI.—The only product sold by plaintiff during the year 1951 as a result of its limestone mining operations was Portland cement in bulk and in bag or sack containers.

Finding of Fact X.—In the principal marketing area served by plaintiff, the market for limestone such as plaintiff mined at its quarry was negligible unless it was processed to obtain cement.

Finding of Fact XI.—The commercially marketable mineral product obtained by plaintiff from mining during the year 1951 was bulk Portland cement at its plant at Monolith, California.

Conclusion of Law II.—Plaintiff, as mine operator, mined a calcium carbonate rock generally known as "limestone" which it processed to obtain any of the various types of Portland cement.

Conclusion of Law V.—The commercially marketable mineral product obtained by plaintiff was bulk Portland cement at its plant in Monolith, California, located within a distance of fifty (50) miles from the quarry operated by plaintiff.

All of such findings are fully and clearly supported by all the evidence. Any attempt to attack such findings must be justified by a demonstration that they are “clearly erroneous.” In the absence of any evidence favorable to the Government on this issue, appellant submits such charge to be a frivolous one.

4. The Government’s Untimely Change in Additives Theory Below.

After appellee submitted “Defendant’s Proposed Findings of Fact, Conclusions of Law and Judgment,” it later filed another document relating thereto which was entitled “Defendant’s Proposed Amendments to Proposed Findings of Fact and Conclusions of Law Lodged by Defendant on April 4, 1958.” [Clk. Tr. on App., pp. 444-451.] The “proposed amendments” provided for the exclusion of the additive materials from the computation of percentage depletion and included a computation of the allowable percentage depletion and the refund due on that basis.

The District Court below allowed appellee a hearing on these “proposed amendments.” At that hearing, appellee took the position that to include the additive materials within the computation of appellant’s percentage depletion deduction resulted in:

- (1) percentage depletion on mineral materials for which the depletion statutes had not provided; and

- (2) in the case of additive materials purchased by appellant from others, a duplication of depletion, because appellant was in effect acquiring a depletion allowance on materials upon which the original mine operator had probably already obtained depletion.

The District Court below rejected appellee's proposed amendment to exclude the additives on the ground they were without merit and untimely. [Court's Order of April 14, 1958, Clk. Tr. on App., p. 475.] The lower court stated [Rep. Tr. of April 14, 1958, p. 3, line 6, to p. 4, line 9]:

"The Court: You received some additional instructions from Washington, I take it, Mr. Messer?

Mr. Messer: Yes, your Honor.

The Court: Well, they are a little late and they're a little unmeritorious, shall I say.

Mr. Messer: On the proposed amendment, your Honor?

The Court: Yes. The government could just as well contend that the labor is not depleted, either. This is a tax on gross income limited by net income, is it not?

Mr. Messer: That's right, your Honor. And it's on gross income from mining, or from the property, which means mining; and we are concerned with limestone, which is the depletable mineral involved here.

The Court: As I view it, everything that goes in that to make it a commercially marketable product is part of it—it goes into the sales price—everything up to where it can be sold. Otherwise, why come in here and talk about the clay or the gypsum. Why don't you talk about the labor and the electricity and the power?

Mr. Messer: That's part of the processing of the lime, which is depletable material.

The Court: Putting the clay and the silica and cinders and the fluorspar in is also part of the process, isn't it? Part of making it a marketable mineral property.

I just don't see that there's anything to the government's motion.

I must say that the government certainly dies hard on this issue."

Appellant would like to add that what the District Court below stated applies to all mining operations. All mine operators utilize labor, electricity or other forms of power, machinery and equipment, and many utilize water as does appellant, in order to complete the processing of the mineral mined. Under the percentage depletion statutes, these items, being parts of process steps, are subject to depletion. Certain income and expenses relate to these items, and to the extent they do, depletion is allowed thereon. This result is clearly justified. The percentage depletion statutes refer to the "ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product." It is a question of fact for the trial court to determine whether the item questioned falls within a process step. If the Court finds that it does, it is improper to exclude the item.

The blending of additives with the limestone qualifies as an ordinary treatment process and, therefore, it is improper to exclude the additives.

As to the Government's argument of duplication of depletion, any superficial logic it might possess is destroyed by its inconsistency. Duplication of depletion is not unique. Some overlapping and duplication is inevitable in order to achieve a practical, consistent application of the statute. For example, appellant utilizes a great amount of fuel oil or gas in its rotary kiln sintering process step. The same is true of many other mine operators in other industries such as brick kilns or the production of mercury from heated cinnabar ore in the *New Idria* decision of this Court hereafter quoted. How-

ever, the appellee does not contend for the exclusion of fuel oil or gas in this or any other case even though some other operator has heretofore probably obtained a 27½% depletion allowance thereon.

Therefore, neither of appellee's arguments for the exclusion of additives is convincing. Appellant also submits that the additives question is simply a question of fact as to whether or not the addition and blending of other materials with appellant's limestone is an ordinary treatment process normally applied in order to obtain the commercially marketable mineral product. The District Court below found appellant's finished cement, ready for shipment in bulk, to be appellant's commercially marketable mineral product. [F. of F. No. XI, R. 65; Concl. of Law No. V, R. 70.] The appellee stipulated that the addition and blending of other materials with limestone to be a usual and customary step to obtain finished cement, and the court so found. It did not appeal such ruling or from the ruling that finished cement was appellant's commercially marketable product. Therefore, it may not at this late date change its theory and create a new disputed issue of fact in the face of the record.

5. The New Idria Decision Confirms the Correctness of Including Additives.

In *New Idria Quicksilver Mining Co. v. Commissioner of Internal Revenue* (1944), 144 F. 2d 918, this Court considered another percentage depletion case involving additives and held depletion to be based on the final commercially marketable mineral product without reduction or exclusion for any other mineral added during the processing steps. The Court held in that case that under the percentage depletion statutes, gross income from mining cinnabar ore was the income from the sales of mercury. Mercury was obtained from the cinnabar ore un-

der a process, which, as recited by the Court's opinion, required the admixing of lime with the cinnabar ore in the ordinary process steps. (See 144 F. 2d 918 at 919.)

6. The Government's Inconsistent Position.

The Government's present position on additives is directly contrary to the position it took in *Northwest Magnesite Co. v. United States*, 58-1 USTC Para. 9394 (D. C. E. D. Wash., 1958). That case involved the addition of iron oxide to the kiln feed (comparable to Monolith's process step). The Government sought no allocation or exclusion, and none was made.

Conclusion.

For the reasons stated, the judgment of the United States District Court and the Findings of Fact and Conclusions of Law upon which it is expressly based, should be modified by striking the word "not" in the sentence beginning "The calcium carbonate content, etc." from Finding of Fact V [R. 64]; striking the word "not" in the sentence beginning "The calcium carbonate rock mined by plaintiff, etc." from Conclusion of Law IV [R. 70]; and substituting the words and figures "fifteen (15)" for the words and figures "ten (10)" in Conclusion of Law IV [R. 70].

The judgment should be affirmed in all other respects.

Respectfully submitted,

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APPENDIX "A."

Internal Revenue Code of 1954.

(Title 26, United States Code Annotated)

“§613. Percentage depletion

“(a) General rule.—In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 percent of the taxpayer’s taxable income from the property (computed without allowance for depletion). In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section.

“(b) Percentage depletion rates.—The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

* * * * *

“(6) 15 percent—all other minerals (including, but not limited to, aplite, barite, borax, calcium carbonates, refractory and fire clay, diatomaceous earth, dolomite, feldspar, fullers earth, garnet, gilsonite, granite, limestone, magnesite, magnesium carbonates, marble, phosphate rock, potash, quartzite, slate, soapstone, stone (used or sold for use by the mine owner or operator as dimension stone or ornamental stone), thenardite, tripoli, trona, and (if paragraph (2)(B)

does not apply) bauxite, beryl, flake graphite, fluor-spar, lepidolite, mica, spodumene, and talc, including pyrophyllite), except that, unless sold on bid in direct competition with a bona fide bid to sell a mineral listed in paragraph (3), the percentage shall be 5 percent for any such other mineral when used, or sold for use, by the mine owner or operator as rip rap, ballast, road material, rubble, concrete aggregates, or for similar purposes. For purposes of this paragraph, the term 'all other minerals' does not include—

“(A) soil, sod, dirt, turf, water, or mosses;
or

“(B) minerals from sea water, the air, or similar inexhaustible sources.

“(c) Definition of gross income from property.—For purposes of this section—

“(1) Gross income from the property.—The term 'gross income from the property' means, in the case of a property other than an oil or gas well, the gross income from mining.

“(2) Mining.—The term 'mining' includes not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary or his delegate finds that the physical and other requirements are

such that the ore or mineral must be transported a greater distance to such plants or mills.

“(3) Extraction of the ores or minerals from the ground.—The term ‘extraction of the ores or minerals from the ground’ includes the extraction by mine owners or operators of ores or minerals from the waste or residue of prior mining. The preceding sentence shall not apply to any such extraction of the mineral or ore by a purchaser of such waste or residue or of the rights to extract ores or minerals therefrom.

“(4) Ordinary treatment processes.—The term ‘ordinary treatment processes’ includes the following:

“(A) In the case of coal—cleaning, breaking, sizing, dust allaying, treating to prevent freezing, and loading for shipment;

“(B) in the case of sulfur recovered by the Frasch process—pumping to vats, cooling, breaking, and loading for shipment;

“(C) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment;

“(D) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation

(but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores; and

“(E) the pulverization of talc, the burning of magnesite, and the sintering and nodulizing of phosphate rock.”

APPENDIX "B."

Table Showing Page References to Identification, Offer, Admission and Rejection of Exhibits

Exhibit No.	<u>Identification</u>		<u>Offer & Admission</u>		<u>Offer & Rejection</u>	
	<u>Reporter's Transcript</u>	<u>Printed Record</u>	<u>Reporter's Transcript</u>	<u>Printed Record</u>	<u>Reporter's Transcript</u>	<u>Printed Record</u>
1	T. 8-2-57, p. 3	R.	T. 8-2-57, p. 5	R. 43		
2	T. 8-2-57, p. 3	R.	T. 8-2-57, p. 5	R. 43		
3	T. 8-2-57, p. 3	R.	T. 8-2-57, p. 5	R. 43		
4	T. 8-2-57, p. 3	R.	T. 8-2-57, p. 5	R. 43		
5	T. 8-2-57, p. 3	R.	T. 8-2-57, p. 5	R. 43		
6	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
7	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
8	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
9	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
0	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
1	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
2	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
3	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
4	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
5	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
6	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
7	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
8	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
9	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		

Exhibit No.	<u>Identification</u>		<u>Offer & Admission</u>		<u>Offer & Rejection</u>	
	<u>Reporter's Transcript</u>	<u>Printed Record</u>	<u>Reporter's Transcript</u>	<u>Printed Record</u>	<u>Reporter's Transcript</u>	<u>Printed Record</u>
20	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
21	T. 8-2-57, p. 4	R.	T. 8-2-57, p. 5	R. 43		
22	T. 8-2-57, p. 3	R.	T. 8-2-57, p. 3	R. 43		
23	T. 8-2-57, p. 7	R.	T. 8-2-57, p. 15	R. 43		
24	T. 3-21-58, p. 39	R. 46	T. 3-21-58, p. 40	R. 46		
25		R. 46	T. 3-21-58, p. 40	R. 46		
26	T. 3-21-58, p. 41	R. 46			T. 3-21-58, p. 43	R. 46
					T. 3-21-58, p. 45	R. 46
27		R. 46	T. 3-21-58, p. 49	R. 46		
28		R. 46	T. 3-21-58, p. 49	R. 46		
29	T. 3-21-58, p. 51	R. 46	T. 3-21-58, p. 67	R. 46		
30	T. 3-21-58, p. 69	R. 46	T. 3-21-58, p. 70	R. 46		
31	T. 3-21-58, p. 104	R. 47	T. 3-21-58, p. 105	R. 47		
32	T. 3-21-58, p. 104	R. 47	T. 3-21-58, p. 108	R. 47		
33		R. 51	T. 3-24-58, p. 149	R. 51		